(2)

Supreme Court, U.S.
FILED
NOV 23 1993
OFFICE OF THE CLERK

No. 93-727

In The

Supreme Court of the United States

October Term, 1993

STATE OF CALIFORNIA,

Petitioner,

vs.

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON, WALNUT PROPERTIES, INC., a California corporation,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division Seven

BRIEF FOR RESPONDENTS IN OPPOSITION

STANLEY FLEISHMAN
Counsel of Record
FLEISHMAN FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

14 pp

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT 1

ARGUMENT 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Farrar v. Hobby, 113 S. Ct. 566 (1992) 4

Hensley v. Eckerhart, 461 U.S. 424 (1983) 4

Hutto v. Finney, 437 U.S. 678 (1978) 3, 5

Owen v. City of Independence, 445 U.S. 622 (1980) 5

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989) 4

STATUTES

42 U.S.C. § 1983 ..... 1, 2, 3

42 U.S.C. § 1988 ..... 1, 2, 6

OTHER

Long Beach, Cal., Mun. Code § 21.51.030 1

Sup. Ct. R. 14.1(k)(ii) 1

Respondents oppose the petition for a writ of certiorari to the California Court of Appeal, Second Appellate District, Division Seven, in this case.

OPINIONS BELOW

Petitioner, in violation of Rule 14.1(k)(ii) of this Court, failed to append the order of the Superior Court, Los Angeles County, awarding respondents attorneys' fees and costs pursuant to 42 U.S.C. § 1988, as prevailing parties. A copy of said order is appended as respondents' appendix (Resp. App.).

STATEMENT

A. In September 1987, the Long Beach City Prosecutor filed a criminal complaint in the Municipal Court of the Long Beach Judicial District, County of Los Angeles, alleging a violation of section 21.51.030 of the Long Beach Municipal Code, which prohibited an "adult" movie theater from operating in certain areas of the city. The complaint alleged that a single exhibition of an adult film in respondents' theater converted it into an adult theater.

Respondents filed a petition in the Superior Court of the State of California for the County of Los Angeles to restrain the criminal prosecution, alleging that the City's ordinance, on its face and as construed, violated the First and Fourteenth Amendments. The action was brought pursuant to 42 U.S.C. § 1983, and alleged that "[b]y the underlying criminal proceedings, [respondents] are being

subjected to the deprivation, under color of state law, of rights, privileges and immunities secured by the constitution of the United States, and particularly of the First and Fourteenth Amendments." App. 67.[1]

Respondents alleged that their activities "are protected by the First Amendment," and that on its face and as applied "the Long Beach ordinance violates the right[s] guaranteed by those provisions." App. 75. Finally, respondents alleged that unless further proceedings were restrained they "will be irreparably injured in that the exercise of their right or freedom of speech will be chilled and denied." App. 76. Accordingly, they sought an order restraining further criminal proceedings. App. 77.

On August 5, 1987, the Superior Court issued its judgment, App. 80-83, finding that the criminal proceedings subjected respondents "to a deprivation of rights secured by the First and Fourteenth Amendments to the United States Constitution" and issued its writ. App. 81-82. The California Supreme Court affirmed, stating that each count of the complaint was "based on the unconstitutional 'single use' standard and that the City Prosecutor could not proceed with the action as pleaded." App. 20.

B. On November 21, 1988, respondents moved in the superior court for a fee award against the City of Long Beach pursuant to 42 U.S.C. § 1988, alleging that they are the prevailing party in the proceeding brought pursuant to 42 U.S.C. § 1983, and that no special circumstances existed that would render an award of fees

---

[1] App. refers to the Appendix to Petition.

unjust. App. 86. The motion was heard on February 13, 1990.

On March 9, 1990, the Honorable Jack Newman, Judge of the Superior Court, filed an order, awarding fees. The court found that the action to restrain the Long Beach City Prosecutor from pursing the criminal prosecution was filed pursuant to 42 U.S.C. § 1983; that the petition was brought pursuant to the City Prosecutor's unconstitutional "single showing" standard; that respondents were being subjected to the deprivation, under the color of state law, of rights, privileges and immunities secured by the First and Fourteenth Amendments to the United States Constitution; that the activities on which the criminal cases were based were protected by the First Amendment; that the City's ordinance, as interpreted and applied by the City Prosecutor, violated the federal constitution; and that unless the criminal proceeding was restrained, respondents' First Amendment rights would be chilled and denied. Resp. App. 1-4.

The court found that respondents are the prevailing parties, Resp. App. 3-4; that *Hutto v. Finney*, 437 U.S. 678 (1978), rejected the suggestion that government entities or their employees are immune from fees, Resp. App. 4; that the City of Long Beach was the real party in interest, Resp. App. 4; that there were no "special circumstances" that would render a fee award unjust, Resp. App. 4; and that the "invocation of prosecutorial immunity is without merit," Resp. App. 4.

On May 7, 1993, the California Court of Appeal filed its opinion affirming the award of attorneys' fees. App.

41-61. On August 12, 1993 the California Supreme Court denied the Long Beach City's petition for review. App. 63.

ARGUMENT

Although it is difficult to decipher the petition because, *inter alia*, it contains 83 footnotes, many of which are long and rambling, it is clear that the petition does not raise any federal question worthy of review. The decision of the court below does not conflict with any decision of this Court; indeed it is in total harmony with the decisions of the Court.

1. The court of appeal held that respondents were the prevailing party because they filed their action to prevent any prosecution based on the unconstitutional charges and, at the termination of the case the California Supreme Court restrained the criminal prosecution. Thus, the action changed the legal relationship between the parties: "Where once respondents were defendants threatened with a prosecution for alleged violation of a Long Beach municipal ordinance, at the end they were freed from having to defend against the unconstitutional charges." App. 48-49. In reaching this result, the court of appeal correctly relied on *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See also Farrar v. Hobby*, 113 S. Ct. 566 (1992), decided after the court of appeal rendered its opinion.

2. The court of appeal held that no immunity shields the City from paying a fee award under section 1988 because neither municipalities or their employees

are immune from fees. App. 50-52. In reaching this result the court properly relied on *Hutto v. Finney*, 437 U.S. 678 (1978), and *Owen v. City of Independence*, 445 U.S. 622 (1980).

3. Ruling that the superior court properly found the City of Long Beach to be the real party in interest and liable for fees, the court of appeal stated:

> All the criteria for imposing the fee award against the City of Long Beach are met in this case. The entire controversy concerned the enforcement of Long Beach's zoning ordinance. The "single use" standard was the City Prosecutor's interpretation of the city ordinances. The City Prosecutor's office has defended the ordinance and represented the City's interests in all proceedings at every level. . . . The trial court found, and we agree, the City of Long Beach was the real party in interest in these proceedings to defend the ordinance.

App. 55.

In reaching this conclusion, the court of appeal, quoting *Hutto v. Finney* stated:

> The legislative history makes it clear that in such suits attorneys' fee awards should generally be obtained "either directly from the official, in his official capacity, from funds of his agency or under his control or from the state or local government (*whether or not the agency or government is a named party*)."

App. 55 (emphasis added by the court of appeal).

4. In ruling that section 1988 attorneys' fee awards may be properly awarded in actions to restrain unconstitutional criminal proceedings, the court below stated that the fees in this case were neither incurred nor awarded for the purpose of defending a criminal prosecution. App. 57. Rather, the court explained, respondents simply sought to enforce their right not to have to defend against unconstitutional charges. App. 57. Accordingly:

> It would appear the broad language of section 1988 should encompass proceedings prompted by an impending criminal prosecution as well as actions for declaratory or injunctive relief brought for the same purpose. (Compare *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987) [arrestee properly awarded attorneys' fees against district attorney and attorney general in action for declaratory and injunctive relief to restrain threatened criminal prosecution].)

App. 58.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: November 23, 1993

Respectfully submitted,

FLEISHMAN, FISHER & MOEST
STANLEY FLEISHMAN
Counsel of Record
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

Counsel for Respondents

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOSE RONILLO ABOGADO LUCERO, JIMMIE JOHNSON, WALNUT PROPERTIES, INC., a California corporation, Petitioners, vs. MUNICIPAL COURT OF THE LONG BEACH JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, Defendants. PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	Case No. C 715969 AMENDED PROPOSED ORDER FOR ATTORNEY'S FEES (Filed Mar. 9, 1990)

Petitioners' motion for attorney's fees, made pursuant to 42 U.S.C. § 1988, was duly heard on February 13, 1990. For the foregoing reasons the motion is granted.

A. On January 20, 1989, petitioners filed, pursuant to 42 U.S.C. § 1983, a petition for writ of mandate to restrain criminal proceedings brought against them by the Long Beach City Prosecutor under § 21.51.030 of the Long Beach Municipal Code. The petition alleged that the prosecution was brought pursuant to the city prosecutor's unconstitutional "single-showing" standard (¶ 1,2); that petitioners were being subjected to the deprivation, under the color of state law, of rights, privileges and

immunities secured by the First and Fourteenth Amendments to the United States Constitution and sought relief pursuant to 42 U.S.C. § 1983 (¶ 3); that the Long Beach City Prosecutor initiated and was pursuing the prosecutions against petitioners, asserting that "a single-showing of an 'x-rated' movie in a particular location violated the Long Beach ordinance" (¶ 16); that petitioners' activities on which the criminal cases were based or protected by the First Amendment, and that the Long Beach ordinance as interpreted and applied by the City Prosecutor violates the Federal Constitution (¶ 20); that petitioners had no plain speedy or adequate remedy other than the relief sought in the petition (¶ 21); and that unless the proceeding initiated and pursued by the City Prosecutor is restrained "petitioners will be irreparably injured in that the exercise of their First Amendment rights will be chilled and denied (¶ 22).

Petitioners prayed for a writ directing the City Prosecutor to show cause why a peremptory writ should not issue restraining further proceedings under the criminal complaints initiated and pursued under the unconstitutional single-showing theory. Petitioners also sought attorney's fees.

> This court granted the writ. It determined that, pursuant to controlling authority, the proceedings against petitioner under the allegations of the complaint filed in the respondent court subject the petitioners to a deprivation of rights secured by the first and fourteenth amendments to the United States Constitution and article I, section 2 of the California Constitution.

Judgment for Issuance of Peremptory Writ of Mandate at 2 (Aug. 5, 1987).

The court of appeal affirmed the judgment of this court, *People v. Superior Court (Lucero)*, 198 Cal. App. 3d 1038, 244 Cal. Rptr. 502 (1988), and the Supreme Court affirmed the judgment of the court of appeal. *People v. Superior Court (Lucero)*, 49 Cal. 3d 14, 259 Cal. Rptr. 740 (1989).

B. The Civil Rights Attorney's Fees Awards Act of 1976 provides in pertinent part that "[i]n any action or proceeding to enforce . . . section[] . . . 1983 . . . of the title . . . , the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the cost." 42 U.S.C. § 1988 (1982). The statute applies in state courts equally as in federal courts. *E.g., Filipino Accountants' Ass'n v. State Bd. of Accountancy*, 155 Cal. App. 3d 1023, 1031, 204 Cal. Rptr. 913, 917 (1984).

This is a proper case for a fee award under § 1988 because this proceeding was brought to enforce 42 U.S.C. § 1983. Petitioners are entitled to fees since they are clearly the prevailing parties. They initiated the proceeding to restrain the criminal proceedings under the City Prosecutor's "single-use" theory, and the Supreme Court held that each count of the criminal complaint was "based on the unconstitutional 'single-use' standard," and that the city was "not entitled to proceed with the action as pleaded." *People v. Superior Court (Lucero)*, 29 Cal. 3d at 28, 774 P.2d at 777, 259 Cal. Rptr. at 748.

C. In enacting § 1988, "Congress considered and firmly rejected the suggestion that States should be immune from fee awards." *Hutto v. Finney*, 437 U.S. 678,

693 n.31, 98 S. Ct. 2565, 2577, n.31 (1978). Congress "intended that the attorneys fees, . . . will be collected either directly from the official in his official capacity, . . . or from the . . . local government (whether or not the . . . government is a named party)" *id.* at 694, 98 S. Ct. at 2575.

The City of Long Beach is the real party in interest in this case and is liable for fees. There are no "special circumstances" here that would render a fee award unjust, and the "invocation of prosecutorial immunity is without merit and may be disposed of summarily." *Wilson v. Stocker*, 819 F.2d 943, 950 (10th Cir. 1987).

D. Petitioners' counsel, Stanley Fleishman, reasonably expended 88.42 hours in connection with this matter. A reasonable rate for his services is $350 per hour. Accordingly a reasonable attorney's fee award in this action for his services would be $30,947.00.

Petitioners' counsel, David Grosz, reasonably expended 89 hours in connection with this matter. A reasonable rate for his services is $200 per hour. Accordingly, a reasonable attorney's award in this action for his services would be $17,800.00

The lodestar amount comes to $48,747 (Fleishman, $30,947.00; Grosz $17,800.00). The sum of $13,747.00 should be deducted from this amount to reflect the fact that petitioners were not entirely successful in this proceeding. Accordingly, petitioners are entitled to attorney's fees in the sum of $35,000. Additionally, they are entitled to costs in the sum of $1,773.85.

E. These conclusions are reached in the exercise of this court's discretion, and after consideration of all the factors enumerated in *Serrano v. Unruh (Serrano III)*, 20 Cal. 3d 25, 49, 569 P.2d 1303, 1316, 141 Cal. Rptr. 315, 328 (1977), in light of the findings of fact heretofore made, the record in this case, and the court's own observations, knowledge, experience, and expertise.

IT IS THEREFORE ORDERED that the City of Long Beach pay to petitioners' counsel the total sum of $36,773.85 as and for attorney's fees and costs in accordance with 42 U.S.C. § 1988.

Dated: MAR 09 1990

JACK M. NEWMAN
JUDGE OF THE
SUPERIOR COURT